

SOUTH AFRICA / JUDGMENT

Dumas v Concord Group CC (NCT/324897/2024/148(1)) [2024] ZANCT 38 (26 September 2024) [2024] ZANCT 38

COURT

National Consumer Tribunal

BEFORE

Z Ntuli, MC Peenze, S Mthembu

CASE / FILE NUMBER

NCT/324897/2024/148(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

SITUATED AT CENTURION

Case number: NCT/324897/2024/148(1)

In the matter between: ANDRE MARLON DUMAS APPELLANT and CONCORD GROUP CC
RESPONDENT

Coram:

Ms Z Ntuli

- Presiding Tribunal Member

Dr MC Peenze -

Tribunal Member

Mr S Mthembu -

Tribunal Member

Date of Hearing

- 5 September 2024

Date last document received - 25 September 2024

Date of Judgment

- 26 September 2024

JUDGMENT AND REASONS

INTRODUCTION

1. This is an appeal against the order of a single member of the National Consumer Tribunal (the Tribunal) in terms of which the applicant was denied condonation for the late filing of his leave to refer application to the Tribunal under section 75(1)(b)[1] of the National Credit Act 34 of 2005 (the NCA).
2. The appellant is Andre Marlon Dumas, an adult male. He is a consumer, as defined in section 1 of the Consumer Protection Act 68 of 2008 (the CPA).[2] The appellant had been authorised through a competent power of attorney to appeal the condonation ruling on behalf of his son, also Andre Marlon Dumas, who was the applicant in the refused condonation application (the applicant).[3] For ease of reference, the applicant and the appellant will be referred to as “the applicant” in this judgment.
3. At the hearing, the applicant represented himself.
4. The respondent is Concord Group CC, a close corporation duly incorporated and registered in terms of the company laws of the Republic of South Africa. The respondent is incorrectly cited as Concord Food and Drug Distributors (Pty) Ltd in the proceedings before the Tribunal. Concord Food and Drug Distributors (Pty) Ltd was initially registered in 1972 as a limited liability company that underwent an amendment in 1987 when it was converted from a limited liability company to a close corporation by the name of Concord Food and Drug Distributors CC under registration number 1987/02252/23. This close corporation, in turn, underwent a change of name in 2016 to become Concord Group CC. The respondent is a supplier, as defined in section 1 of the CPA.
5. Mr Ian Knight, an attorney from Molefe Knight Attorneys, represented the respondent in the hearing.

APPLICATION TYPE

6. This is an application to appeal a refusal order in terms of section 148(1) of the NCA. The Tribunal issued a written judgment dated 15 April 2024, in which a single member refused the applicant’s application for condonation for the late filing of his application for leave to refer.
7. The Tribunal has jurisdiction to hear the appeal in terms of section 27 of the NCA.
8. This judgment follows the filing of pleadings by the parties per Rule 26[4] and their submissions during the hearing on 5 September 2024.

BACKGROUND

9. The applicant lodged an application with the Tribunal under section 75(1)(b), requesting a finding of prohibited conduct and an order directing the respondent to pay general damages suffered.
10. According to the applicant, on 16 March 2013, as a child, he attended a children's party where swimming was involved. When he returned home, he complained about water in his ear and lay on the affected side so the water could flow out. On 18 March 2013, the water was still present in his ear.
11. The mother bought Swimmers Ear Cleanser (the product) from Clicks Tyger Valley. She administered the drops to the affected ear. He fainted for a few seconds whilst screaming. On the way to the emergency room, he complained about the throbbing inner ear, excruciating pain, and severe headache. There was also nose bleeding and drainage from the ear, and he had vertigo, tinnitus, and severe middle ear pain.
12. The doctor diagnosed perforation of his tympanum/eardrum. They showed the doctor the medicine they used. The doctor indicated that the product contained surgical spirits. The doctor noted that the packaging had no schedule, side effects, indications, contra-indications, or medicine ingredients. As a result of using the product, the applicant suffered chronic labyrinthitis.
13. The applicant believes that the respondent must be liable for damages relating to his loss of income, medical expenses, pain, suffering and the fact that he could not pursue his career in the marine. The applicant relied on section 61, dealing with the strict liability of suppliers for harm caused by the products supplied.
14. The respondent does not believe the applicant has presented medical evidence to support the negligence claim against the respondent. According to the respondent, the applicant sustained a perforated eardrum before the use of the product. Therefore, the respondent submits that the applicant is making an unsupported allegation that the administration of the product into his ear caused chronic labyrinthitis. The respondent submits that the product is safe for use under normal conditions. Over 434 662 units of the product have been sold in South Africa over the years, and the applicant is the only person ever to lodge a complaint regarding the use of the product.
15. On 27 July 2015, the father submitted a complaint to the NCC on behalf of the applicant, who was 14 years old and a minor. The NCC issued a notice of non-referral, dated 16 November 2022, on 17 November 2022. On 25 November 2022, the applicant approached the Tribunal to apply for leave to refer. As the applicant was overseas between November 2022 and February 2023, he requested an extension to file his application for leave to refer. He outlined that he would also file a condonation application. On 24 April 2023, the applicant filed his application for leave to refer and his condonation application. Following various interactions with the Registrar, a notice of filing for the condonation application was issued

on 25 May 2023.[5] The respondent filed an answering affidavit in the condonation application, and the applicant attempted to file his replying affidavit in January 2024. As the replying affidavit was filed late, the applicant also attempted to file a condonation application for the late filing of the replying affidavit. Due to uncertainty regarding the proper service of supplementary documents, the Registrar did not issue a notice of complete filing for the replying affidavit's condonation application. As a result, the condonation application was considered without the applicant's replying affidavit. On 15 April 2024, the Tribunal issued a refusal

ruling, dismissing the applicant's condonation application.

16. In the condonation ruling, the single member confirmed that the appellant's claim is time-barred in terms of section 116(1)(a), as the appellant filed his leave to refer application with the Tribunal more than three years after the conduct which is the cause of his complaint. Accordingly, the single member concluded that there is no reasonable prospect of the Tribunal being able to adjudicate the appellant's claim. The single member, therefore, refused the application for leave to refer.

THE APPEAL

17. The applicant motivated his appeal by submitting that the single member incorrectly based his decision on the premise that three years had lapsed since the dispute ensued and failed to consider the content of the applicant's replying affidavit in the condonation application.
18. According to the applicant, the delay in bringing the application to the Tribunal resulted from delays outside the applicant's control. He submits that section 116(1)(a) should not limit the applicant in bringing his application before the Tribunal, as he was deprived of the opportunity to present his case. Different organisations attempted to negotiate a settlement with the respondent, but the dispute could not be settled.
19. The applicant further submitted that he has a good chance of success in the main matter and would suffer serious harm if the Tribunal did not consider his complaint.

CONSIDERATION

20. The full panel must decide whether the single member made an error or misdirected himself on the law or the facts of the case. To this extent, it is useful to briefly outline the Tribunal's authority to consider consumer complaints.
21. The Tribunal derives its powers and authority from its empowering legislation. Like other similar bodies, the Tribunal only has those powers granted by its constitutive statutes and empowering legislation.[6] Accordingly, when considering a consumer complaint, the Tribunal must act within the limitations set by the CPA.
22. The relevant facts in this matter need clarification. The applicant, in essence, brought two complaints to the Tribunal:

22.1 That the respondent supplied a product during or around 2013 which was dangerous and caused him to suffer severe medical conditions (the first complaint); and

22.2 That the respondent produced and retailed an unsafe product until 2021 when it was discontinued (the second complaint).

Regarding the first complaint:

23. Section 116(1)(a) limits the powers of the Tribunal and restricts referring a complaint to the Tribunal more than three years after the act or omission that is the cause of the complaint.
[7]
24. The “cause of the complaint”, as referred to in clause 116(1)(a), is the prohibited conduct that gives the complainant the right to seek judicial redress from the Tribunal. Therefore, the “cause of the complaint” is the date the applicant’s mother administered the product to his ear, which occurred on 18 March 2013.
25. According to the applicant, the product was the direct cause of his chronic labyrinthitis, ongoing vertigo and nerve damage of the inner ear.
26. The applicant alleges that damage occurred due to the respondent's failure to disclose, among other things, the indications, contra-indications, side effects, treatment specifications regarding allergens, and general instructions in the eardrops.
27. The appeal panel agrees with the presiding member that the incident that forms the basis of the applicant's first complaint happened more than ten (10) years before the applicant approached this Tribunal.
28. Section 116(1)(a) prevents the Tribunal from hearing any matter more than three years after the cause of the complaint. The High Court has confirmed that the Tribunal cannot interrupt or extend the time bar.[8] Therefore, the Tribunal does not have the authority to find that the three-year period in section 116(1) was interrupted while the NCC considered the matter. The High Court’s judgment binds the Tribunal. Although the judgment referred to section 166 of the NCA, section 166 is identical to section 116 of the CPA. Section 116 does not allow any discretionary element. It places an absolute bar on considering a matter older than three years.
29. The applicant’s submissions on appeal do not provide any basis for the Tribunal to depart from the binding judgment by the High Court. The applicant failed to provide an adequate legal argument as to why the ratio decidendi regarding the Tribunal’s statutory limitation does not find application as contextualised in the Ludick matter.
30. Per section 116(1)(a), the applicant had to bring his complaint to the Tribunal within three years after using the product.

31. The Tribunal finds no evidence that the single member erred in arriving at a decision to refuse the condonation application in respect of the first complaint. This complaint is found to be time-barred from being referred and considered by the Tribunal. Therefore, the Tribunal concurs with the refusal order issued by the single member on 15 April 2024 concerning the first complaint.
32. The Tribunal shares the applicant's frustration with his application being barred due to the time-lapse. It is most certainly a difficult situation for consumers with legitimate claims. However, the CPA provides no basis for the

Tribunal to ignore or extend the time bar. Applications must be lodged in time, or the legislature must see fit to grant the Tribunal

the discretion to grant leave for a time-barred application on good cause shown.

Regarding the second complaint:

33. The applicant alleges that the respondent supplied a dangerous product until 2021 when it was discontinued. According to the applicant's founding affidavit,

the respondent did not have a licence in terms of section 22C(1)(b) of the Medicines and Related Substance Act to manufacture the product. On 20 October 2021, SAHPRA (South African Health Products Regulatory Authority) issued an urgent medical device recall of the product.[9] According to the applicant, the respondent's manufacturing and supplying of the product constituted a course of conduct that persisted until 20 October 2021.
34. The applicant further alleges that the respondent failed to disclose sufficient product information on the product, which practice continued until the recall of the product in 2021.
35. Under section 116(1)(b), the time bar for a course of conduct or continuing practice is determined differently from the time bar under section 116(1)(a). It states that an application to the Tribunal can be made no more than three years after the conduct or practice ceased. It is common cause that the respondent terminated the manufacturing and retailing of the product on 20 October 2021. The applicant filed its application for leave to refer on 24 May 2024, less than three years after the respondent ceased the alleged prohibited practice. Therefore, the second complaint is not time-barred by section 116(1)(b).
36. The reasons for the termination are disputed. The respondent argues that the product was retracted because revised legislation necessitated

acquiring a licence to manufacture a medical device, which was not required before. According to the respondent, the product was sold and marketed as an ear cleanser to remove water in the ear and was not classified as a medical device.[10] In contrast, the applicant argues that his right to a safe product was infringed, as it was sold over the counter without warnings. Further, the applicant argues that the recall occurred as the direct result of an investigation by SAPHRA into the product's unsafe characteristics.[11]

37. The appeal panel finds that the single member did not consider the applicant's second complaint. Therefore, the Tribunal finds sufficient evidence that the single member erred and misdirected himself on the law and facts of the case in deciding to refuse the application for condonation. The appeal panel finds good reason to grant the condonation application concerning the second complaint, as this complaint is not time-barred.

CONDONATION RULING OVERTURNED

38. The appeal panel now turns to consider the condonation application in respect of the second complaint. As the appeal panel concluded that the second complaint is not time-barred per section 116(1)(b), the appeal panel now considers whether the condonation application should be condoned despite being filed more than 20 days after the NCC's ruling was issued.

The law

39. Section 150(e) states that in addition to its other powers under the NCA, the Tribunal may make an appropriate order concerning prohibited conduct or required conduct in terms of the NCA or the CPA, including condoning any non-compliance with its rules and procedures. Rule 34(2) empowers the tribunal to condone a departure from its rules and procedures "on good cause shown."

What may constitute "good cause" is not defined, but we can take direction as to how this was dealt with in our courts of law.

40. It is trite that condonation is not there for the mere asking. A party seeking condonation for non-compliance with the court's (or the Tribunal's) rules seeks an indulgence and must make out a case entitling it to such indulgence. Sufficient cause must be shown, which requires the condonation-seeking party to explain the non-compliance fully. Notably, the explanation must be reasonable enough to excuse the default.[12]
41. Rule 34 (1) provides that "A party may apply to the Tribunal in Form Tl r.34 for an order to:
- (a) condone late filing of a document or application;
 - (b) extend or reduce the time allowed for filing or serving;
 - (c) condone the non-payment of a fee; or
 - (d) condone any other departure from the rules or procedures."
42. To condone means to "accept or forgive an offence or wrongdoing". The word stems from the Latin term *condonare*, meaning "refrain from punishing". It can also be defined as "overlook or forgive (wrongdoing)".[13]

43. In *Melane v Santam Insurance Company Limited*,^[14] it was held that the court has a discretion, to be exercised judicially upon considering all the facts. In essence, it is a matter of fairness to both sides. Among the facts that are usually relevant are the degrees of lateness, the explanation, the prospects of success, and the importance of the case. These facts are interrelated and are not individually decisive. What is needed is an objective conspectus of all the facts.
44. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*,^[15] it was held that the standard of considering an application of this nature is the interest of justice.
45. Whether it is in the interest of justice to grant condonation depends on each case's facts and circumstances. It requires the exercise of discretion based on an objective conspectus of all the facts. The relevant factors include but are not limited to the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal and the prospects of success.^[16]

Consideration

46. The NCC issued a notice of non-referral on 17 November 2022 and advised the applicant that he could submit his complaint to the Tribunal within 20 business days of the signature date of the notice of non-referral. However, the notice of non-referral also outlines that the complaint had been attended to in 2016 and that the NCC re-issued the notice of non-referral. The NCC did not attach the original notice of non-referral allegedly issued in 2016. There is no evidence before the Tribunal to indicate that the applicant received the notice of non-referral on any date other than 17 November 2022. Also, the NCC indicated in its notice of non-referral that the application to the NCT must be submitted within 20 business days of the signature date of the notice of non-referral, 16 November 2022. Further, the appellant's argument that the NCC corresponded with him concerning the complaint up to 2021 casts doubt as to the finalisation of the investigation by the NCC in 2016. On the evidence before the Tribunal, the appeal panel accepts the applicant's version, namely that it received the NCC's notice of non-referral on 17 November 2022.
47. The applicant had until 16 January 2023 to file his application with the Tribunal.
48. As outlined above, the applicant approached the Tribunal on 25 November 2022, intending to apply for leave to refer. As the applicant was overseas between November 2022 and February 2023, he filed his application for leave to refer and his condonation application on 24 April 2023, approximately 90 days late. Following various interactions with the Registrar, a notice of filing for the condonation application was issued on 25 May 2023.^[17]
49. According to the applicant, he is a layperson presently unemployed. As he was in Saudi Arabia in November 2022, he relied on his father to assist him in receiving the NCC's notice of non-referral and enquiring from the NCT on the procedures to follow in filing his

application for leave. According to the applicant, he was under contract in Saudi Arabia until 24 February 2022. Unfortunately, his stay got delayed due to unforeseen circumstances, and he arrived back in South Africa on 20 April 2024. He immediately finalised the leave to refer application on his return and submitted it to the Registrar. The applicant submits that he did not intentionally delay applying for leave.

50. The respondent takes issue with the applicant's unsigned affidavit as commissioned. The appeal panel considered the parties' arguments and was persuaded that although an unsigned version was filed, an adequately signed affidavit was subsequently submitted to the Tribunal. Further, the respondent objects to including the applicant's replying affidavit in the condonation application, as it was not filed in terms of the rules. After consideration of the evidence before the Tribunal, the appeal panel is persuaded that the replying affidavit in the condonation application had not been filed within the extended timeframe as directed by the Registrar. Accordingly, the appeal Tribunal finds that the replying affidavit in the condonation application does not form part of the record, and the single member did not err in disregarding the contents thereof. Similarly, the appeal panel disregarded the replying affidavit, and this ruling is based on the record considered by the single member.
51. The appeal panel wishes to pause by outlining to the parties that the condonation application is only the first hurdle in presenting a consumer's matter to the Tribunal. If condonation is granted, the consumer's leave to refer application must still be considered in a second interlocutory process. Given that the respondent's answering affidavit was filed regarding both the condonation and leave to refer applications, such an answer will again be considered when the leave to refer application is adjudicated. Only if leave to refer is granted will the main proceedings (the main matter) commence. Per the Tribunal Rules, the respondent will de novo be provided with an opportunity to file an answering affidavit in the main matter within 15 days after the issuing of the leave to refer ruling if granted. After filing an answering affidavit, if any, the applicant may file a replying affidavit in the main matter within ten days of receipt of the respondent's answering affidavit. The appeal panel clarifies this process, as the applicant is not fully acquainted with the practices and interlocutory processes of the Tribunal.
52. The respondent also objected to its incorrect citation in the application documents. The respondent has since confirmed the correct citation, which the applicant does not dispute. The Tribunal, per its discretion in terms of rules 15 and 16(1), has corrected the respondent's citation. The corrected citation will not affect the validity of any prior proceedings.
53. The respondent also questioned the applicant's bona fides, as the dates of his anticipated return to South Africa are inconsistently referred to in the filed papers. In the applicant's condonation application, he states that he was due to return to South Africa on 24 February 2023. However, annexure CA1 to the founding affidavit states that he was due to return to South Africa on 4 February 2023. According to the respondent, the date difference raises a question of credibility. The Tribunal has considered the discrepancy and is persuaded that the discrepancy amounts to an error, which is not material. The Tribunal is persuaded that

the discrepancy does not constitute mala fides on the applicant's side.

54. From the exposition above, the applicant relied on assistance from the Registrar to submit his application to the Tribunal. Although he carefully followed the prescripts, he struggled to obtain and submit the required documents on time. The Tribunal is persuaded that the applicant was not desirous of wasting the Tribunal's time by referring his complaint late. The Tribunal accepts that the delay was not due to the applicant deliberately or wilfully disregarding the Tribunal Rules.
55. The application to the Tribunal was filed about 90 days late. In the circumstances of this matter, the Tribunal does not regard the extent of lateness as excessive. Further, granting the condonation will not prejudice the respondent, as its opposing papers will be considered in adjudicating the leave to refer application.
56. The Tribunal further considered the importance of observing fairness and adherence to the principles of natural justice. The Tribunal is persuaded that the applicant intended to comply with its rules but was not fully acquainted with the requirements of Table 2 of the rules. He also experienced challenges obtaining the required proof of serving his application by registered mail on the respondent. The matter is very important to the applicant, and he has a reasonable prospect of success if he can provide evidence that the respondent engaged in a prohibited practice up until 2021 by having supplied a product that did not comply with the prescripts of the CPA.
57. The Tribunal finds that the applicant had shown sufficient cause.[18] The Tribunal is further mindful of its duty under section 4(2)(b)(ii) to make appropriate orders to give practical effect to the consumer's right of access to redress. Hence, the Tribunal considered the importance of observing fairness and adherence to the principles of natural justice.
58. Given that the probative value of the averments raised by the applicant is not to be decided in this application, the Tribunal concludes that it would be in the interest of justice that he be allowed to apply for leave accordingly. In this context, the Tribunal favourably considers the request for condonation for the late filing of the applicant's leave to refer application regarding his second complaint.

Requested relief

59. In the main matter, the applicant requests a finding of prohibited conduct and an order directing the respondent to pay compensation for his damages. The Tribunal wishes to clarify its statutory authority and limitations when considering general damages.
60. The CPA aims to protect consumers from exploitation and abuse in the marketplace. It empowers the Tribunal to make various orders in respect of prohibited conduct. However, the CPA does not empower the Tribunal to order general damages or other incidental costs. Section 52(1)(b) indicates that civil courts may assess and order such damages. It states, "If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that this Act does not otherwise provide a remedy

sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability, the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).”

61. Accordingly, what would be appropriate in this case is for the applicant to institute a civil claim for general damages before an appropriate forum if he believes that such a claim can be proved. If the Tribunal finds that the respondent transgressed the CPA, the applicant could request a section 115(2)(a) certificate to support its claim for general damages in the appropriate forum.

62. In terms of section 115(2)(a), a person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form:

“(i) certifying whether the conduct constituting the basis for the action has been found to be prohibited or required conduct in terms of [the CPA];

(ii) stating the date of the Tribunal’s finding, if any; and

(iii) setting out the section of [the CPA] in terms of which the Tribunal made its finding, if any.”[19]

CONCLUSION

63. The Tribunal finds that the single member erred and misdirected himself in arriving at a decision to refuse the condonation application for the late filing of the leave to refer application. Although the applicant’s first complaint is found to be time-barred from being referred, the second complaint may be adjudicated by the Tribunal.

64. Having considered the arguments regarding the late filing of the condonation application, the appeal panel finds that it is in the interest of justice that the condonation application is granted.

ORDER

65. Accordingly, the Tribunal makes the following order:

65.1 The appeal application concerning the first complaint is dismissed;

65.2 The appeal application concerning the second complaint is granted;

65.3 The late filing of the leave to refer application is condoned;

65.4 The leave to refer application can be set down for adjudication; and

65.5 No cost order is made.

Dr MC Peenze Tribunal Member

Ms Z Ntuli (Presiding Tribunal member) and Mr S Mbhele (Tribunal member) concur.

- [1] This section provides: “If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to (a) . . . ; or (b) the Tribunal, with the leave of the Tribunal.”
- [2] A reference to a section in this judgment refers to a section of the CPA.
- [3] The appellant filed the power of attorney on 25 September 2024, as directed by the panel and agreed to by the respondent during the hearing of 5 September 2024.
- [4] A reference to a rule in this ruling refers to the Rules of the National Consumer Tribunal, GN 157, G. 39663 (4 February 2016).
- [5] See page 128 of the record, bundle B.
- [6] See De Ville J, *Judicial Review of Administrative Action in South Africa*, 2004, p. 91
- [7] “Section 116 Limitations of bringing action (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after – a.
the act or omission that is the cause of the complaint; or b.
in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”
- [7] “Section 116 Limitations of bringing action
(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after –
a.
the act or omission that is the cause of the complaint; or
b.
in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”
- [8] *FirstRand Bank Ltd v Ludick* A 277/2019 High Court of South Africa, Gauteng Division, Pretoria, 18 June 2020 (unreported) at para [16].
- [9] Act 101 of 1965.
- [10] See pages 142-143 of the record, bundle B.
- [11] See page 82 of the record, bundle B.
- [12] See *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at para 23.

[13] Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg 170.

[14] 1962

(4) SA 531 (A) at 532C-F.

[15] 2003

(11) BCLR 1212 (CC) at para [11].

[16] Van Wyk v Unitas Hospital and Others 2008(4) BCLR 442 (CC) at para 20 as applied in Camagu v Lupondwana Case No 328/2008 HC Bisho.

[17] See page 128 of the record, bundle B.

[18] Grootboom v National Prosecuting Authority and Another [2013] ZACC 37; 2014

(2) SA 68 (CC) at para 22-23 and 51.

[19] Section 115(3).

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